

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

DWIGHT CLARK, SR.,)	
)	
Claimant-Below)	
Appellant,)	
)	
v.)	C. A. No. 04A-10-004-JEB
)	
STATE OF DELAWARE,)	
)	
Employer-Below,)	
Appellee.)	

Submitted: May 5, 2005
Decided: August 31, 2005

*Appeal from a Decision of the Industrial Accident Board.
Decision Affirmed.*

OPINION

Appearances:

Kenneth F. Carmine, Esquire, Wilmington, Delaware.
Attorney for Dwight Clark.

Kimberly Ann Harrison, Esquire, Wilmington, Delaware.
Attorney for the State of Delaware.

JOHN E. BABIARZ, JR., JUDGE

This is the Court's decision on an appeal of a decision of the Industrial Accident Board ("Board") denying workers' compensation benefits to Claimant Dwight D. Clark, Sr. For the reasons explained below, the Board's decision is affirmed.

FACTS

On February 12, 2004, Claimant was the driver of a DART bus when it was struck in the left back side by a school bus. The mirror of the school bus scraped the DART bus, which had stopped to let passengers come aboard. Claimant felt a slight jerk and turned to his left to see what had happened. He felt a twinge in his back and got out of the bus to check for damage to the bus. He radioed DART to report the incident. As he waited for DART personnel to arrive, his neck, shoulders and back began to get stiff, and he was taken to Wilmington Hospital by ambulance. He was given a muscle relaxer and a pain reliever and told to go home. Because of continuing low back pain, he was referred to Bruce Katz, M.D., an orthopaedic surgeon. Dr. Katz treated Claimant and also referred him to another physician who administered a nerve block to help control Claimant's pain.

Claimant missed two weeks of work and returned on a part-time basis on April 1, 2004. Dr. Katz released Claimant to work without restriction on April 15, 2004. Claimant filed a petition for workers' compensation benefits for periods of total and partial disability, as well as medical expenses. In preparation for the hearing, Claimant was examined by John Parkerson, M.D., who specializes in occupational medicine. At the hearing before the Board, testimony was presented by Claimant, his wife, a DART employee, as well as Dr. Katz and

Dr. Parkerson, the latter of whom both testified by deposition. Claimant introduced digital images taken by cameras inside the DART bus before, during and after the accident. The images did not show the driver but showed various interior views of the bus and some of its occupants. The Board denied the petition for workers' compensation benefits, and Claimant filed a timely appeal to this Court.

STANDARD OF REVIEW

In reviewing a decision of an administrative board, the Court's role is to determine whether the Board's findings are supported by substantial evidence and are free from legal error.¹ Substantial evidence is evidence that a reasonable person might accept as adequate to support a conclusion.² When parties present testimony from expert witnesses, the Board is free to choose between conflicting opinion, and either opinion will constitute substantial evidence for purposes of appeal.³ The Court does not weigh the evidence, determine questions of credibility or make factual findings.⁴ It merely determines if the evidence is legally adequate to support the Board's findings.⁵

DISCUSSION

Claimant argues that the Board erred in admitting the digital image video taken from

¹*Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. Ct. 1979).

²*Breedings v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1998).

³*Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

⁴*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1960).

⁵DEL. CODE ANN. tit. 29, § 10142(d).

inside the DART bus and that the Board impermissibly inferred from the video that the accident could not have caused Claimant's back injury. Claimant suggests that without the video there is not substantial evidence to support the Board's findings. Employer argues that the video was properly introduced and that the Board's decision was based on substantial evidence in addition to the video.

The Board found that Claimant was not a credible witness overall. His description of the bus accident as a "slight jerk"⁶ was found to be inadequate to explain back problems of the nature and severity that Claimant reported. The Board also observed that Claimant failed to tell Dr. Parkerson about his prior back problems, which cast further doubt on his credibility. The video showed that the bus did not move or shake after being struck by the school bus. The Board identified specific contradictions and was well within its discretion in finding that Claimant was not credible.

In regard to causation, the Board accepted the opinion of Dr. Parkerson that the accident did not cause Claimant's back pain because there were no objective findings of injury and that Claimant magnified his symptoms. The Board is free to accept either doctor's opinion as the basis for its factual findings.⁷

These conclusions leave only one issue to be considered – the video. In *Davis v. Maute*, the Delaware Supreme Court held that a party to a personal injury case may not argue

⁶Transcript of the Proceedings at 15.

⁷*Reese v. Home Budget Center*, 619 A.2d at 910.

that the seriousness of the plaintiff's injuries from a car accident correlates to the extent of the damage to the cars, unless the party can produce competent expert testimony on the issue.⁸ This proposition is inapplicable here because the videotape was direct evidence of the force of impact. *Davis v. Maute* does not prohibit evidence of force. It simply requires expert testimony to correlate property damage with force.⁹ Admissibility of photographs of a vehicle turns on whether the risk that the factfinder will draw an improper inference substantially outweighs the probative value of the photographs.¹⁰ In this case, Dr. Parkerson stated that he could have formed his medical opinion without benefit of the digital images, and he did not testify as to the force of the collision. Furthermore, the Board in its discretion may entertain evidence that might not be admissible under the Delaware Rules of Evidence.¹¹ The Court concludes that an expert witness was not necessary and that the probative value of the video in establishing what actually happened outweighs the risk that the Board would draw an improper inference.

Most importantly, the video was relevant to Claimant's credibility, which was called into question during his testimony on cross-examination. Employer conceded that the mirror of the school bus scraped the DART bus, but argued that Claimant's version of the incident

⁸*Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001).

⁹*Garneski v. Teromina*, 2003 WL 504863 at *1 (2003).

¹⁰*Davis* at 41 (citing D.R.E. 403).

¹¹*Torres v. Allen Family Foods*, 672 A.2d 26, 31-32 (Del. 1995).

was not consistent with what actually happened. Although Claimant said he felt a slight jerk upon impact, the digital images showed no such motion inside the bus. Claimant's credibility was also called into question by Dr. Parkerson, who found objectively normal physical findings and who believed that Claimant was exaggerating his symptoms. Claimant was less than forthright with Dr. Parkerson in omitting any reference to his prior back problems. Thus the digital images served to undermine Claimant's credibility, not to show that because the bus suffered little damage, Claimant did not either. The Court concludes that the Board did not err in admitting and considering the digital images.

CONCLUSION

For all these reasons, the Board's decision denying Claimant Dwight Clark's petition for unemployment compensation benefits is affirmed.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

Original to Prothonotary
JEB,jr/ram/bjw